UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, v. DTE ENERGY COMPANY and DETROIT EDISON COMPANY, Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO
STRIKE PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

The question before this Court on Detroit Edison's motion to strike EPA's preliminary injunction motion is why the Court should be forced to expend its resources on what is effectively a full trial on the merits at this early stage of the litigation, when it is clear that no irreparable harm exists and EPA's motion is procedurally and legally deficient. EPA invites the Court to effectively resolve the issues of liability and remedy at the preliminary injunction stage in the face of sharply contested facts and without the benefit of discovery. As discussed in Detroit Edison's opening brief, EPA bases its motion on *alleged facts* contained in nine declarations spanning 404 pages. Doc. No. 15 at 21.[1] Eight of these "declarations" amount to full-fledged expert reports, addressing contested issues that EPA has been litigating in its utility enforcement initiative, with mixed results (at best), for more than a decade. *Id.* at 15-19. Detroit Edison will respond in kind. That is why Detroit Edison asked for 90 days for its response, which the Court granted. Should this Court deny this motion to strike, it is easy to imagine a hearing that is more akin to a full-blown trial, in which experts and facts witnesses from each side would testify.

The preliminary injunction sought by EPA—directing Detroit Edison to obtain New Source Review ("NSR") permits, limit the operation of other Detroit Edison units not at issue in this case, and install pollution controls on Monroe Unit 2—is permanent and mandatory in nature, and drastically alters the *status quo*. As Detroit Edison noted in its opening brief, EPA's request for preliminary injunctive relief roughly parallels the prayer for final relief in its Complaint. Applications of this sort violate the Sixth Circuit's longstanding view that preliminary injunctions should "preserve the court's ability to render a meaningful decision after

[1] In its opposition, EPA repeatedly asserts that Detroit Edison has "yet to identify any material facts in dispute." *See, e.g.*, Doc. No. 23 at 1. Detroit Edison does dispute the vast majority of facts alleged in EPA's brief, including the opinions alleged in the declarations and the facts upon which these opinions rely.

a trial on the merits," *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978), and have been rejected by this and other district courts in the Sixth Circuit as premature and procedurally improper. *See* Doc. No. 15 at 23-26. Moreover, in its August 30 Order, this Court foreclosed any arguably *potential* harm by accepting Detroit Edison's proposal to operate Monroe 2 at no more than pre-project levels, ordering the Company to so operate. Doc. No. 29 at 1-2.

Detroit Edison respectfully submits that, for these reasons, the Court should not expend valuable judicial resources to adjudicate a motion for preliminary injunction that is deficient on its face. EPA's motion should be stricken, and the case set for discovery and trial on a normal schedule.

ARGUMENT

A preliminary injunction is "an extraordinary remedy never awarded as of right." *Winter v. Nat'l Res. Def. Council*, 129 S.Ct. 365, 376 (2008). Because a preliminary injunction issues before liability is determined, it is considered "one of the most drastic tools in the arsenal of judicial remedies." *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 444 (6th Cir. 2003) (quotations omitted). In this case, most of the relief EPA seeks at the preliminary injunction stage is the ultimate relief that it seeks in the Complaint. Doc. No. 1 at 15-16 (Prayer for Relief). EPA alleges that such extraordinary relief is warranted here because "Monroe Unit 2 has been generating much more pollution than the law allows" since completion of the project in June 2010. Doc. No. 8 at 37. EPA is mistaken.

To begin with, Monroe Unit 2 is not generating more pollution than the law allows. It is operating pursuant to a valid state-issued permit that is subject to emission limitations that both EPA and the State of Michigan have found to be "requisite to protect the public health," "allowing an adequate margin of safety." 42 U.S.C. § 7409(b)(1). EPA does not claim that

Detroit Edison has exceeded these limits—in fact, these limits are set on the basis of the unit operating at full capacity all the time, something Monroe 2 never actually does.

Moreover, Detroit Edison proposed and this Court ordered the company "not to utilize the generator that is subject of the underlying motion to any extent that is greater that it was utilized prior to the Project at issue." Doc. No. 29 at 1-2. This interim measure is carefully tailored to address the alleged statutory violation at Monroe Unit 2, prevents any arguably possible environmental injury,[2] and "preserve[s] the court's ability to render a meaningful decision after a trial on the merits." *Stenberg*, 573 F.2d at 925.

It is undisputed that, before Detroit Edison undertook the project at issue, Monroe Unit 2 was operating in accordance with its CAA permit, and thus, as a matter of law, its emissions were not causing harm to public health and the environment. Continuing to operate at the same levels of emissions after the project has occurred cannot be causing any such harm either. Given the Court's limitation on Monroe Unit 2's operations, and in light of the fact that, pursuant to the CAA, the unit's emission limits have been set at levels that protect the public health with an adequate margin of safety, it follows that Monroe Unit 2 is currently operating at levels that are below those EPA and the state have determined to be protective of public health.

Despite all this, EPA would have Detroit Edison apply for and obtain NSR permits and limit the operation and emissions of Detroit Edison units that are not alleged to have violated any law and that have nothing to do with this litigation.[3] EPA's Proposed Order at 2, ¶ 4. In

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[2] Detroit Edison does not in any way concede that, even if Monroe 2 were to operate at levels higher than its pre-project baseline and consistent with the emissions limits contained in its CAA permits, any increased emissions would result in environmental harm—much less, irreparable harm.

[3] An NSR permit application can take two years or more to process, involves an array of case-by-case evaluations of air quality impacts and potentially available control technologies, requires public hearings, and is subject to third-party appeals. *See, e.g.*, 68 Fed. Reg. 61,248, 61,250 (Oct. 27, 2003) (acknowledging that obtaining an NSR permit "is likely to be time-consuming and expensive"). EPA's observation that it is not asking the Court in its preliminary injunction motion to require the installation of

addition, under EPA's proposed preliminary injunction, the requested "annual obligation to reduce ... air pollution" across Detroit Edison's fleet "continue[s] until Monroe Unit 2 installs pollution controls that meet emissions limits set by NSR permits." *Id.* Contrary to EPA's opposition, such relief is not temporary. Doc. No. 23 at 6. Rather, should the Court award this injunctive relief, Detroit Edison would be forced to commit irretrievable resources to achieve compliance, including operational changes and capital expenditures that it would incur prior to a hearing on the merits. If this Court ultimately agrees with the other courts that have found similar projects are not modifications, *see, e.g., Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, No. 3:01-CV-71, 2010 WL 1291335, at *26-29 (E.D. Tenn. Mar. 31, 2010) (economizer and superheater replacement not modifications), and *United States v. Cinergy Corp.*, No. 1:99-cv-01693-LJM-JMS (Verdict Form) (S.D. Ind. May 22, 2008) (various retubing projects and reheater replacement not modifications) (Ex. A), Detroit Edison would have been punished for conduct that does not violate the law, and would have been required to divert air pollution control resources and expenditures away from current efforts to comply with other Clean Air Act programs. That commitment of resources could not be undone at the end of the case, undermining the Court's ability to render any meaningful decision on the merits. Nor is the relief requested by EPA in its motion for preliminary injunction materially different than the permanent relief requested and rejected in *Lowrey v. Beztak Properties*, No. 06-13408, 2009 WL 309390 (E.D. Mich. Feb. 3, 2009) and *Brown v. Voorhies*, No. 07-cv-463, 2009 U.S. Dist. LEXIS 110961, *3 (S.D. Ohio Sept. 10, 2009). Like the plaintiff in *Beztak Properties*, EPA

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controls on Monroe Unit 2 itself is smoke-and-mirrors. First, such controls must be determined by the permitting authority in the very permit proceeding that EPA asks the Court to order. *See, e.g.*, 42 U.S.C. § 7479(3). Second, as EPA knows full well, advanced SO2 and NOx controls—scrubber and SCR—are already planned for Monroe Unit 2 by 2014. *See* Doc. No. 15-2, Boyd Decl. ¶ 5.

seeks this permanent relief before demonstrating that EPA is actually "entitled to [it]." 2009 WL 309390, *2.

CONCLUSION

For these reasons and for the reasons stated in Detroit Edison's opening brief, EPA's motion should be stricken.

Respectfully submitted, this 7th day of September, 2010.

/s/ F. William Brownell

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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This 7th day of September, 2010.

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EXHIBIT A

TO

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff, STATE OF NEW YORK, STATE OF NEW JERSEY, STATE OF CONNECTICUT, HOOSIER ENVIRONMENTAL COUNCIL, and OHIO ENVIRONMENTAL COUNCIL, Plaintiff-Intervenors, vs. PSI ENERGY, INC. and THE CINCINNATI GAS & ELECTRIC COMPANY, Defendants.	)	1:99-cv-1693-LJM-JMS

VERDICT FORM

We, the Jury in the above-entitled action, unanimously find in favor of:

PROJECTS FOR WHICH DEFENDANTS ASSERT A ROUTINE MAINTENANCE, REPAIR, AND REPLACEMENT DEFENSE

____ Plaintiffs	✓ Defendants	on Project #4, the condensor retubing project at Beckjord unit 5 from January 1991 to February 1991;
____ Plaintiffs	✓ Defendants	on Project #5, the condensor retubing project at Beckjord unit 6 from September 1994 to November 1994;
✓ Plaintiffs	____ Defendants	on Project #11, the front wall radiant superheater replacement project at Wabash River unit 2 from June 1989 to July 1989;

✓ Plaintiffs ____ Defendants on Project #12, the high temperature finishing superheater tubes and upper reheater tubing assemblies replacement project at Wabash River unit 2 from May 1992 to September 1992;

✓ Plaintiffs ____ Defendants on Project #13, the finishing, intermediate, and radiant superheater tubes and upper reheat tube bundles replacement project at Wabash River unit 3 from June 1989 to October 1989;

✓ Plaintiffs ____ Defendants on Project #15, the boiler pass and heat recovery actions replacement project at Wabash River unit 5 from February 1990 to May 1990;

REMAINING PROJECTS

____ Plaintiffs ✓ Defendants on Project #1, the life extension project at Beckjord unit 1 from November 1987 to February 1988;

____ Plaintiffs ✓ Defendants on Project #2, the life extension project at Beckjord unit 2 from October 1987 to January 1988;

____ Plaintiffs ✓ Defendants on Project #3, the life extension project at Beckjord unit 3 from October 1985 to January 1986;

____ Plaintiffs ✓ Defendants on Project #6, the pulverizers replacement project at Gallagher unit 1 from April 1998 to July 1998;

____ Plaintiffs ✓ Defendants on Project #7, the condensor retubing project at Gallagher unit 2 from August 1990 to December 1990;

____ Plaintiffs ✓ Defendants on Project #8, the pulverizers replacement project at Gallagher unit 3 from February 1999 to April 1999;

____ Plaintiffs ✓ Defendants on Project #9, the reheater tube section replacement project at Gibson unit 2 from February 2001 to May 2001; and

___ Plaintiffs ✓ Defendants

on Project #10, the slope tubes and lower headers replacement project at Miami Fort unit 5, January 1995 to March 1995.

SEE COURT FILE

FOR ORIGINAL

May 22, 2008
Date